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No. 02-819

IN THE

Supreme Court of the United States

ANDREW J. KONTRICK,

Petitioner,

v.

ROBERT A. RYAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONER

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25 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 2

A. Rule 4004 Is Not "Presumed" to Be Subject to Equitable Defenses Simply Because the Bankruptcy Court Has Equitable Powers 2

1. A Court of Equity Does Not Have Free Rein to Disregard the Plain Language of a Rule 2

2. This Court's Decision in *Young* Recognizes That Equitable Exceptions Do Not Apply If "Inconsistent With the Text of the Relevant Statute" 3

B. "Jurisdictional" When Used to Describe Rule 4004 Does Not Mean Subject Matter Jurisdiction 5

1. Rule 4004 Does Not Involve Subject Matter Jurisdiction 5

2. Respondent's Reliance on Statutes Defining the Subject Matter Jurisdiction of the Bankruptcy Court Is Misplaced 7

C. Based on Respondent's Reasoning, All Deadlines Set By the Bankruptcy Rules Are Waivable, Which Is Not Correct 8

1. Federal Rules, Not Just Statutes, Set Deadlines That Cannot Be Waived 8

2. The Rules Enabling Act Does Not Make Every Bankruptcy Rule Waivable 10

D. Giving Effect to the Plain Meaning of Rule 4004 Does Not Deprive Litigants of Their Day in Court or Undermine the Policy of Finality 12

E. The Virtually Identical Language of Rules 6(b) and 9006(b)(3) Cannot Have Entirely Different Meanings Merely Because the Bankruptcy Rules Set Prejudgment Deadlines 13

F. The Text of Rules 4004 and 9006(b)(3) Does Not Allow For Excluding Some Equitable Defenses, But Not Others 15

G. Respondent and Amicus Fail to Distinguish *Taylor* or *Carlisle* 17

CONCLUSION 19

TABLE OF AUTHORITIES

FEDERAL CASES

American National Bank & Trust Co. v. City of Chicago, 826 F.2d 1547 (7th Cir. 1987) 6

Anderson v. Wilson, 289 U.S. 20 (1933) 1

Bank of Nova Scotia v. United States, 487 U.S. 250 (1988) 9

Carlisle v. United States, 517 U.S. 416 (1996) 5,7, 9, 12, 17-19

Hedges v. Dixon County, 150 U.S. 182 (1893) 3

In re Barley, 130 B.R. 66 (Bankr. N.D. Ind. 1991) 17

In re Bond, 254 F.3d 669 (7th Cir. 2001) 11

In re Booth, 103 B.R. 800 (Bankr. S.D. Miss. 1989) 17

In re Chicago, Milwaukee, St. Paul & Pac. R.R., 791 F.2d 524 (7th Cir. 1986) 3

In re Dollar, 257 B.R. 364 (Bankr. S.D. Ga. 2001) 16

In re Dombroff, 192 B.R. 615 (S.D.N.Y. 1996) 10, 11

In re Gardenhire, 209 F.3d 1145 (9th Cir. 2000) 3, 14

In re Kirsch, 65 B.R. 297 (Bankr. N.D. Ill. 1986) 16, 17

In re Laurain, 113 F.3d 595 (6th Cir. 1997) 14

In re Leet, 274 B.R. 695 (B.A.P. 6th Cir. 2002) 4, 7

In re Maughan, 2003 U.S. App. LEXIS 16656 (6th Cir. Aug. 14, 2003) 5

In re Poskanzer, 146 B.R. 125 (D.N.J. 1992) 16, 17

In re Rinde, 276 B.R. 330 (Bankr. D.R.I. 2002) 16

In re Santos, 112 B.R. 1001 (B.A.P. 9th Cir. 1990) 10, 15

In re Stoulig, 45 F.3d 957 (5th Cir. 1995) 15

In re Thomas, 203 B.R. 64 (Bankr. E.D. Tex. 1996) .. 16, 17

International Longshoremen's Ass'n v. Davis, 476 U.S. 380 (1986) 6

INS v. Pangilinan, 486 U.S. 875 (1988) 3

Matter of Carlson, 126 F.3d 915 (7th Cir. 1997) 18

Matter of Greenig, 152 F.3d 631 (7th Cir. 1998) 2, 14

Pioneer Investor Service Co. v. Brunswick Associates Ltd., 507 U.S. 380 (1993) 14

Schacht v. United States, 398 U.S. 58 (1970) 8-10

Shapiro v. Doe, 396 U.S. 488 (1970) 10

Taylor v. Freeland & Kronz, 503 U.S. 638 (1992) 17, 18

Towne v. Eisner, 245 U.S. 418 (1918) 6

United States v. Beggerly, 524 U.S. 38 (1998) 4

United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33 (1952) 5

United States v. McDowell, 117 F.3d 974 (7th Cir. 1997) 19

United States v. Robinson, 361 U.S. 220 (1960) 1, 9

United States v. Ron Pair Enterprises, 489 U.S. 235 (1989) 8

Young v. United States, 535 U.S. 43 (2002) 3, 4, 5

Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982) 10

FEDERAL STATUTES AND RULES

11 U.S.C. § 105 18

11 U.S.C. § 157 7

11 U.S.C. § 507(a) 4

28 U.S.C. § 1334(c)(2) 7

28 U.S.C. § 2072(b) 10, 11

28 U.S.C. § 2075 ..... 10, 11

Fed. R. Bankr. P. 1001 ..... 12, 13

Fed. R. Bankr. P. 3002(c) 2, 3, 14

Fed. R. Bankr. P. 4003 ..... 12, 15, 17, 18

Fed. R. Bankr. P. 4004 ..... passim

Fed. R. Bankr. P. 4007 ..... 4, 5, 10, 12, 13, 15, 17

Fed. R. Bankr. P. 8002 ..... 11, 12

Fed. R. Bankr. P. 9006(b) ..... passim

Fed. R. Bankr. P. 9030 8

Fed. R. Civ. P. 6(b) ..... passim

Fed. R. Civ. P. 72(b) 8

Fed. R. Crim. P. 2 12

Fed. R. Crim. P. 29(c) 13, 18, 19

Fed. R. Crim. P. 35(b) 19

Fed. R. Crim. P. 45(b) 9, 18, 19

OTHER AUTHORITIES

H. R. Rep. No. 95-595, at 449 (1977); *reprinted in* 1978 U.S.C.C.A.N. 5963, 6573 11

28 AM. JUR. 2d, *Estoppel and Waiver*, § 37 (2000) 16

Frankfurter, Felix, SOME REFLECTIONS ON THE READING OF STATUTES, 47 Colum. L. Rev. 527 (1947) 1

MOORE'S FEDERAL PRACTICE, 1.04, 1 App. 12-13 (3d ed. 2003) 11

RESTATEMENT (SECOND) OF JUDGMENTS, § 11 (1982) 6

INTRODUCTION

Most deadlines set by federal rules may be waived. Yet the rulemakers have made plain that a small number may not. And contrary to respondent's various arguments, whether a deadline may be waived does not turn on a supposed "presumption" in favor of equitable exceptions in bankruptcy court. It also does not turn on whether the deadline was set by rule or statute, or whether the word "timely" appears in another statute, or whether the deadline is pre or post-judgment, or whether it favors certain policy concerns.

Rather, whether a deadline is jurisdictional, that is non-waivable, turns first and foremost on the language of the rule itself. If the language is clear, then that alone governs. As Justice Frankfurter stated, "We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take the statute as we find it." Frankfurter, Felix, SOME REFLECTIONS ON THE READING OF STATUTES, 47 Colum. L. Rev. 527, 534 (1947) (quoting *Anderson v. Wilson*, 289 U.S. 20, 27 (1933) (Cardozo, J.)).

In this case, respondent does not contend that Rules 4004 and 9006(b)(3) are ambiguous. Thus, the plain meaning of these rules controls unless in the rare case it is "demonstrably at odds" with the drafters' intent. Here, there is not the slightest indication that the plain meaning of Rules 4004 and 9006(b)(3) is in any way contrary to the rulemakers' intent. In fact, a line of authority going back over 40 years—to *United States v. Robinson*, 361 U.S. 220, 224 (1960)—consistently holds that deadlines based on Rule 6(b) must be read as "mandatory and jurisdictional" and do not allow late filings to be excused on equitable grounds such as

waiver. There is no reason to read Rules 4004 and 9006(b)(3) any differently.

ARGUMENT

A. Rule 4004 Is Not "Presumed" to Be Subject to Equitable Defenses Simply Because the Bankruptcy Court Has Equitable Powers

1. A Court of Equity Does Not Have Free Rein to Disregard the Plain Language of a Rule

Respondent begins his argument by simply declaring that Rule 4004 is a "limitations period" (Resp. Br. at 10-11) and then proceeds to the unremarkable proposition that a statute of limitations may be waived unless raised as an affirmative defense. *Id.* at 11-12, 32. Yet respondent puts the cart before the horse by first presuming that Rule 4004 is a statute of limitation. That is the central issue in this case—whether Rule 4004 is jurisdictional and thus not a statute of limitation and not waivable.

Respondent next argues that equitable defenses to statutes of limitation are "presumed" in bankruptcy cases, because bankruptcy courts are courts of equity. Resp. Br. at 12-13; 22-25. Whatever validity this statement may have in the abstract, it has no validity to the rule at issue here. Courts of equity do not have a roving commission to ignore the express language of a rule. This principle is well illustrated in *Matter of Greenig*, 152 F.3d 631 (7th Cir. 1998). In *Greenig*, certain creditors did not file their proof of claim within the deadline set by Rule 3002(c)—another one of the rules listed in Rule 9006(b)(3). However, since the debtor had already listed the claim in a plan of reorganization,

the bankruptcy court excused the untimely filing based on equitable considerations. The Seventh Circuit reversed:

> "Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law." (citing *INS v. Pangilinan*, 486 U.S. 875, 883 (1988) quoting *Hedges v. Dixon County*, 150 U.S. 182, 192 (1893)...."The fact that a [bankruptcy] proceeding is equitable does not give the judge a free-floating discretion to redistribute rights in accordance with his [or her] personal views of justice and fairness, however enlightened those views may be." (quoting *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 791 F.2d 524, 528 (7th Cir. 1986)). In this case, the trial court acted improperly in that it allowed [the creditor] to circumvent Rule 3002(c) and file an untimely proof of claim because of equitable considerations.

152 F.3d at 635. *See also In re Gardenhire*, 209 F.3d 1145, 1150-51 (9th Cir. 2000) (court lacks equitable discretion to allow an untimely claim under Rule 3002(c), even though other sections in the Bankruptcy Code allow for equitable tolling). Thus, a bankruptcy court cannot—any more than another court—use its equitable powers to "presume" equitable defenses that are at odds with the unambiguous text of Rules 4004 and 9006(b)(3).

2. This Court's Decision in *Young* Recognizes That Equitable Exceptions Do Not Apply If "Inconsistent With the Text of the Relevant Statute"

Respondent and the United States as amicus rely heavily on this Court's decision in *Young v. United*

States, 535 U.S. 43 (2002). Resp. Br. at 10, 12, 38, Amicus Br. at 14-15. However, aside from the fact that the *Young* case involves the general topic of bankruptcy, it has no similarities to this one. First, *Young* did not deal with the Bankruptcy Rules in general, let alone those listed in Rule 9006(b)(3) in particular, or any of the parallel rules modeled on Fed. R. Civ. P. 6(b). Rather, *Young* dealt with a three-year look-back period for tax returns described in section 507(a)(8)(A)(i) of the Bankruptcy Code. Based on the particular language of that section and its purpose, the Court held that the three-year period could be equitably tolled by the filing of an earlier chapter 13 case. 535 U.S. at 50-51. At the same time, however, the Court recognized that it would not have allowed an equitable exception if it was "inconsistent with the text of the relevant statute." *Id.* at 49, quoting *United States v. Beggerly*, 524 U.S. 38, 48 (1998).

For this reason, the court in *In re Leet*, 274 B.R. 695 (B.A.P. 6th Cir. 2002) readily concluded that *Young* did not permit a late filing under Rule 4007 to be excused on equitable grounds:

> Some may read [*Young*] broadly, since the Court observed that "[i]t is hornbook law that limitations periods are 'customarily subject to equitable tolling,'" but that statement was finished with its own restriction, "unless tolling would be 'inconsistent with the text of the relevant statute.'" By analogy, the applicable Rule 4007(c) requires that any extension of the sixty-day limitation be sought within that time period; thus, the equitable tolling applied by the bankruptcy court in this case was *inconsistent with the text of the relevant rule*. Our conclusion is not changed by *Young*.

Id. at 700. [citations omitted, emphasis added).[1] Therefore, *Young* does not support the notion that in the realm of bankruptcy the universal principle of giving effect to the plain meaning of a rule somehow gives way to "presumptions" in favor of equitable defenses.

B. "Jurisdictional" When Used to Describe Rule 4004 Does Not Mean Subject Matter Jurisdiction

1. Rule 4004 Does Not Involve Subject Matter Jurisdiction

In his dissent in *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 39 (1952), Justice Frank-

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[1] Recently, the Sixth Circuit held that Rule 4007 was non-jurisdictional in *In re Maughan*, 2003 U.S. App. LEXIS 16656 (6th Cir. Aug. 14, 2003). In *Maughan*, the court held that the creditor could use equitable tolling to file a complaint after the deadline because the debtor had not complied with an earlier discovery request. In doing so, the court found the reasoning of the Seventh Circuit in this case "somewhat puzzling" (*Id.* at * 14, n.7) and based its holding on entirely different grounds.

The court reasoned that because it had allowed extensions when the court set the wrong deadline, this also "cracked open the door of equity through which the bankruptcy court might accept an untimely complaint." *Id.* at * 10. Extending a deadline because of the court's own error is also known as the "unique circumstances doctrine." Pet. Br. at 27-28. The idea that this doctrine is a "crack" large enough through which all equitable defenses might pass has been soundly rejected. *Id.* at 28. In fact, it is directly contrary to *Carlisle v. United States*, 517 U.S. 416 (1996). There, the Court rejected an argument that the unique circumstances doctrine could be relied on for " 'an inherent power' to act in contravention of applicable Rules." *Id.* at 428.

furter referred to what he described as "unwaivable limitations" on the authority of an administrative agency and stated, "I do not use the term 'jurisdiction' because it is a verbal coat of too many colors." *See also International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 402 (1986) ("we all know that the term 'jurisdiction' does not partake of that specialized a meaning") (Rehnquist, J. concurring). And in *American National Bank & Trust Co. v. City of Chicago*, 826 F.2d 1547, 1552 (7th Cir. 1987), the court pointed out, "when a court says it lacks jurisdiction it may mean that the plaintiff came to the wrong court, that he came too early, that he came too late ... that the legislature did not authorize the court to decide the case (subject matter jurisdiction)." Therefore, the word "jurisdiction" has a variety of different meanings depending upon the context in which it is used.[2]

The term "subject matter jurisdiction" means the power or authority of a court to adjudicate a particular type of case; it is also referred to as a court's "competency." *See* RESTATEMENT (SECOND) OF JUDGMENTS, § 11, pp. 108-09 (1982). On the other hand, when courts state—as they frequently do—that a particular deadline is "jurisdictional," they are referring to a different concept; namely, that after a certain deadline has expired, the court lacks the power to extend it based upon equitable grounds not contained in the rule. Some courts decline to use the term "jurisdictional" in favor of stating that a court lacks the authority to excuse a late filing

[2] In considering the term "jurisdiction," Justice Holmes' observation in *Towne v. Eisner*, 245 U.S. 418, 425 (1918) is apt: "A word is not a crystal, transparent and unchanged, it is the skin of living thought and may vary greatly in color and content according to the circumstances and time in which it is used."

on equitable grounds. *See, e.g., Leet*, 274 B.R. at 700, n.6. As Justice Ginsburg noted in her concurrence in *Carlisle v. United States*, 517 U.S. 416, 434 (1996), "It is anomalous to classify time prescriptions, even rigid ones, under the heading 'subject matter jurisdiction'."

2. Respondent's Reliance on Statutes Defining the Subject Matter Jurisdiction of the Bankruptcy Court Is Misplaced

The difference between subject matter jurisdiction and deadlines referred to as "jurisdictional" is important here because both respondent and amicus devote large portions of their briefs to statutes dealing with the bankruptcy court's subject matter jurisdiction. First, they rely on the fact that the statute giving a bankruptcy court subject matter jurisdiction over objections to discharge, 11 U.S.C. § 157(b)(2)(J), does not use the word "timely" or have an express time limit. Resp. Br. at 14-16, 20-21, Amicus Br. at 10-14. They then point to other statutory provisions that do use the word "timely." *See* § 157(b)(3) (dealing with a bankruptcy court's "core" jurisdiction); § 157(c)(1) (review of non-core proceedings) and 28 U.S.C. § 1334(c)(2) (abstention). Yet where the word "timely" appears in these other statutes has no bearing on whether Rule 4004 may be altered on equitable grounds.[3]

There is no dispute that section 157(b)(2)(J) gives a bankruptcy court subject matter jurisdiction over objections to discharge. Yet that section coexists harmoniously with Rule 4004. Section 157(b) does not attempt to define when objections to discharge must be

[3] Contrary to respondent's argument (Br. at 24-25), it is also of no significance that Rules 4004 and 9006(b)(3) do not contain the words "jurisdictional" or "waiver." None of the deadlines patterned on Rule 6(b) do.

filed. That function is specifically addressed by the Bankruptcy Rules. Whether those rules allow for equitable defenses must be determined from the text of the rules themselves, unless it is "demonstrably at odds" with the drafters' intent. *See United States v. Ron Pair Enterprises*, 489 U.S. 235, 242 (1989). Therefore, nothing about the wording of the subject matter jurisdiction statutes sheds any light on the rulemakers' intent and cannot be used to contradict the plain meaning of Rules 4004 and 9006(b)(3).

For the same reason, the reliance which respondent and amicus place on Bankruptcy Rule 9030 is misplaced. *See* Resp. Br. at 16-17, Amicus Br. at 11, 13. Rule 9030 merely states that the rules may not "extend or limit" the bankruptcy court's jurisdiction and respondent acknowledges that this refers to subject matter jurisdiction. Br. at 16-17. By their own terms, Rules 4004 and 9006(b)(3) set deadlines for objecting to discharge and do nothing to "extend or limit" the subject matter jurisdiction of the bankruptcy court.[4]

C. Based on Respondent's Reasoning, All Deadlines Set By the Bankruptcy Rules Are Waivable—Which Is Not Correct

1. Federal Rules, Not Just Statutes, Set Deadlines That Cannot Be Waived

Respondent contends that a court may always "relax" its procedural rules. Resp. Br. at 18, citing *Schacht v. United States*, 398 U.S. 58, 68 (1970). Along

[4] Respondent's reliance on the time limit for objecting to a magistrate judge's recommendation under Fed. R. Civ. P. 72(b) (Br. at 20-21) is far afield from the text of Rules 4004 and 9006(b)(3). One obvious difference is that Rule 72 is not among the jurisdictional time limits listed in Rule 6(b).

the same lines, amicus argues that for a deadline to be jurisdictional "it would need to be established by Congress, not in a rule of practice or procedure adopted by this Court," also citing *Schacht*. Amicus Br. at 11 and n.7. However, neither *Schacht* nor any other authority support the sweeping proposition that only statutes, but not rules, can set deadlines that are not waivable. Indeed, the concurring opinion in *Schacht* by Justice Harlan easily refutes any such idea. In his concurrence, Justice Harlan recognized the distinction between the rule setting the time for filing petitions for certiorari in criminal cases and Rule 45(b) at issue in *United States v. Robinson*, 361 U.S. 220 (1960). The difference was the "express language" of the two rules. Referring to *Robinson*, Justice Harlan noted that there, "[t]he Court thought, *inter alia* that time extensions were *inconsistent with the express language of Rule 45(b)*, and the 'deliberate intention' of its drafters." 398 U.S. at 67, n.7. (emphasis added)

Thus, if the language of the rule is express, as it is in Rule 45(b), then the deadline set by a rule may not be waived. No less can be said of the express language of Rule 6(b) on which both Rule 45(b) and Rule 9006(b)(3) were patterned. Hence, what matters is not whether the deadline is set by rule or statute, but whether the plain meaning of the rule allows for equitable defenses. Thus, there is no support for the argument that all deadlines set by rules are inherently more malleable than those set by statute. *See Carlisle*, 517 U.S. at 426 ("[F]ederal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions") (quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-55 (1988)).

2. The Rules Enabling Act Does Not Make Every Bankruptcy Rule Waivable

Respondent also contends that the Enabling Act for the Bankruptcy Rules, 28 U.S.C. § 2075, makes every deadline set by a Bankruptcy Rule waivable. Resp. Br. at 17-19. This argument is derived from *In re Dombroff*, 192 B.R. 615 (S.D.N.Y. 1996).[5] Resp. Br. at 18. In *Dombroff*, the court attempted to advance the blanket proposition, already discredited above, that deadlines set by rules are always non-jurisdictional, relying on *Schacht* and *Shapiro v. Doe*, 396 U.S. 488, 489 (1970). *Id.* at 620, n.15. Again, *Schacht* does not stand for any such proposition. In relying on *Shapiro*, *Dombroff* actually cited to the dissent. The terse two-sentence *per curiam* decision in *Shapiro* scarcely supports the claim that all rules are waivable. 396 U.S. at 488.

Then, recognizing that some procedural rules are not waivable, *Dombroff* constructed an argument that all deadlines contained in the Bankruptcy Rules may be waived. This argument relies solely on the fact that the Rules Enabling Act, 28 U.S.C. § 2072(b), provides that the rules "supersede conflicting prior statutes" and the similar statute for the Bankruptcy Rules

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[5] The *Dombroff* case is a maverick even among the non-jurisdictional line of cases. In *Dombroff*, the court rejected two decisions relied on by respondent and amicus, *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), and in *In re Santos*, 112 B.R. 1001 (B.A.P. 9th Cir. 1990), as supporting the non-jurisdictional view. The court in *Dombroff* found significant differences between the time limits in *Zipes*, involving filing employment discrimination charges and Rule 4007, such that "*Zipes* therefore provides slender support" for the non-jurisdictional view. 192 B.R. at 620. The *Santos* case relied on *Zipes*. 112 B.R. at 1004-06.

(§ 2075) does not. 192 B.R. at 621. From this, *Dombroff* found that the Bankruptcy Rules have "no statutory effect" and are not jurisdictional. *Id.* Respondent cites no court that has followed *Dombroff*.

Moreover, the fact that section 2072(b) contains what is referred to as a "supercession clause," and section 2075 does not, has nothing to do with whether all Bankruptcy Rules are waivable. The supercession clause in section 2072(b) was designed to allow the original Federal Rules of Civil Procedure from 1937 to override an earlier "Conformity Act" that required state practice rules to be followed in federal courts. MOORE'S FEDERAL PRACTICE § 1.04, 1 App. 12-13 (3d ed. 2003). In contrast, when Congress passed the Bankruptcy Reform Act of 1978, it eliminated a similar supercession clause from section 2075 because in revising the bankruptcy laws, procedural matters that had been contained elsewhere were removed and placed with the rules. As such, "the need that currently may exist to permit the Supreme Court rules to supersede the statute disappears." H.R. REP. NO. 95-595, at 449 (1977); *reprinted in* 1978 U.S.C.C.A.N. 5963, 6573. Further, this argument merely ends with the same faulty premise on which it began—that only statutory deadlines are jurisdictional. In fact, if *Dombroff* were correct, then all Bankruptcy Rule deadlines would be waivable, which is simply not so. For example, Rule 8002, also included in Rule 9006(b)(3), sets the time to appeal a bankruptcy court judgment. This rule is well-established as jurisdictional. *See In re Bond*, 254 F.3d 669, 673 (7th Cir. 2001). Thus, the Rules Enabling Act has no relevance to whether Rule 4004 is jurisdictional.

D. Giving Effect to the Plain Meaning of Rule 4004 Does Not Deprive Litigants of Their Day in Court or Undermine the Policy of Finality

Respondent also contends that not excusing untimely objections on equitable grounds "would deprive litigants of their day in court." Resp. Br. at 31. He also maintains that not permitting equitable exceptions would be contrary to the policy behind Bankruptcy Rule 1001 that the rules are to be "construed to secure the just, speedy, and inexpensive determination of every case and proceeding." *Id.* at 27. Amicus also claims that Rule 1001 favors reading the deadline as waivable. Amicus Br. at 13, 17. Such arguments have no substance.

First, giving effect to the plain meaning of Rules 4004 and 9006(b)(3) does not unfairly deprive litigants of their day in court or otherwise deny them due process. By definition, any jurisdictional deadline, that is, one that does not permit equitable exceptions, always cuts off the relief sought in the untimely filing. That is true whether the untimely filing is a proof of claim under Rule 3002(c), an objection to exemptions under Rule 4003, an appeal under Rule 8002, or an objection to discharge under Rules 4004 or 4007.

Second, the general policy behind Rule 1001 does not override the specific language of Rules 4004 and 9006(b)(3). In *Carlisle*, the defendant invoked the similar general policy behind Fed. R. Crim. P. 2. The Court rejected this argument:

> [Rule 2] is of no aid to petitioner. It sets forth a principle of interpretation to be used in construing ambiguous rules, not a principle of law superseding clear rules that do not achieve the stated objectives. It does not, that

> is to say, provide that rules shall be construed to mean something other than what they plainly say—which is what petitioner's proposed construction of Rule 29(c) would require.

517 U.S. at 424. The same may be said for Rule 1001 here.

Finally, when respondent claims that not allowing equitable exceptions to Rule 4004 would undermine a policy of "finality," he overlooks strong countervailing policy reasons not to allow equitable exceptions. The scenarios described by the National Association of Consumer Bankruptcy Attorneys (NACBA) as amicus involving debtors who may be pressured to waive a late objection are prime examples of the finality concerns underlying Rule 4004. *See* NACBA Amicus Br. at 15-16. Further, engrafting equitable defenses to the deadlines would invite fact-intensive inquiries that would only erode certainty and an expeditious handling of the discharge process. It was such policy concerns that caused the rulemakers to place Rules 4004 and 4007 in the strict category of Rule 9006(b)—that is, among the other rules in subsection (b)(3)—rather than in the permissive category in subsection (b)(1). And whatever the competing policy concerns may have been, they have already been weighed in the rulemaking process. At this point, the task is not to reweigh those policies, but to apply Rule 4004 as it is written.

E. The Virtually Identical Language of Rules 6(b) and 9006(b)(3) Cannot Have Entirely Different Meanings Merely Because the Bankruptcy Rules Set Prejudgment Deadlines

Respondent does not claim that there is any difference between the language of Rules 6(b) and

9006(b)(3). *See Pioneer Investor Service Co. v. Brunswick Associates Ltd.*, 507 U.S. 380, 391 (1993) ("Rule 9006(b)(3) was patterned after Rule 6(b)"). Instead, he argues that the virtually identical language of the two rules should be read differently because "different policy considerations are implicated" with the "prejudgment" deadlines set by the Bankruptcy Rules. Resp. Br. at 28, 31, 33. According to respondent, the first policy concern is that a prejudgment deadline prevents a claim from being heard "on the merits." *Id.* at 31. However, any jurisdictional deadline curtails further judicial consideration "on the merits" at some stage of the proceeding—whether that be pre-trial, post-trial or on appeal. Because the express language of Rule 4004 curtails it earlier is no reason to read Rules 6(b) and 9006(b)(3) differently.

Respondent next argues that post-trial deadlines are jurisdictional, but pre-trial deadlines are not, because post-trial time limits are necessary to "allocate decision-making authority between the district court and court of appeals." *Id.* at 30. This argument ignores that the post-trial motions contained in Rule 6(b) involve ongoing proceedings in the district court and may not be altered on equitable grounds regardless of whether an appeal is ever taken.

In addition, respondent cites no authority, other than the court below, that has adopted this prejudgment-postjudgment distinction. At the same time, he overlooks established precedent holding that other "prejudgment" deadlines set by the Bankruptcy Rules do not excuse late filings based on equitable grounds. *See Greenig*, 152 F.3d at 635 (Rule 3002(c) deadline for filing proofs of claim may not be extended for "equitable considerations"); *Gardenhire*, 209 F.3d at 1151 (same); *In re Laurain*, 113 F.3d 595, 597 (6th Cir. 1997)

(Rule 4003(b) deadline for objecting to exemptions "should be viewed as jurisdictional"); *In re Stoulig*, 45 F.3d 957 (5th Cir. 1995) (same). Moreover, the policy considerations respondent invokes for his pre-versus-postjudgment argument are only just that. Such policy concerns cannot overcome the express language of the rules.

F. The Text of Rules 4004 and 9006(b)(3) Does Not Allow For Excluding Some Equitable Defenses, But Not Others

Respondent and amicus also present an alternative to their argument that *all* traditional equitable defenses are "presumed" in bankruptcy cases. According to this argument, *some* equitable defenses do not apply, but some do. Resp. Br. at 36, Amicus Br. at 16. They do not specify which defenses do not apply—whether it is equitable tolling only or equitable tolling plus estoppel or some other variation. They do, however, claim that waiver would apply to the deadline, even if other defenses do not. They cite no authority for this selective application of equitable defenses other than *In re Santos*, 112 B.R. 1001 (B.A.P. 9th Cir. 1990). Resp. Br. at 36, Amicus Br. at 17. In *Santos*, the court found that equitable tolling and equitable estoppel did not apply to Rule 4007, but that waiver did. *Id.* at 1007-08. The court reached this conclusion in one paragraph, without citation to authority, in which it made a general statement that waiver is "not contrary to the express language" or purpose of the rule and that debtors would not suffer "any impairment" to their interests if they raised the late complaint in an answer. *Id.* at 1008.

However, the attempt in *Santos* to exclude equitable estoppel but include waiver not only lacks any legal basis, but would actually produce anomalous results. Based on the distinction made in *Santos*, a

debtor could *not* consent to an untimely objection to discharge on the day *before* the deadline, but *could* consent to an untimely filing one day *after* the deadline. Rules cannot be read to produce such anomalies. In addition, the dividing line between estoppel and waiver is not always clear and such an attempt to include or exclude defenses only invites confusion.[6]

What is more, the text of Rules 4004 and 9006(b)(3) does not allow for picking and choosing among various equitable defenses. Indeed, other deadlines based on Rule 6(b) or its counterparts have consistently been read as not excusing untimely filings based on equitable grounds, including waiver. *See In re Kirsch*, 65 B.R. 297, 302 (Bankr. N.D. Ill. 1986) ("counsel cannot waive the strict requirement of the rules" [based on Rule 6(b)]). As a result, the courts in the majority have regularly held that a debtor may not waive an untimely objection—either explicitly by stipulation or implicitly by not raising it in an answer. *See In re Poskanzer*, 146 B.R. 125, 131 (D.N.J. 1992) (debtor raised untimely objection after trial began); *In re Rinde*, 276 B.R. 330, 333 (Bankr. D.R.I. 2002) (debtor failed to plead untimely objection as an affirmative defense); *In re Dollar*, 257 B.R. 364, 367 (Bankr. S.D. Ga. 2001) (debtor not allowed to stipulate to late objection as part of settlement of other claims).[7]

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[6] "When an implied waiver is involved, the distinction between waiver and estoppel is close and sometimes the doctrines merge into each other with almost imperceptible gradations, so that it is difficult to determine the exact point where one doctrine ends and the other begins." 28 AM. JUR. 2D, *Estoppel and Waiver*, § 37, p. 468 (2000).

[7] Other decisions recognizing that the deadline cannot be waived include the following: *In re Thomas*, 203 B.R. 64, 68 (Bankr. E.D. Tex. 1996) (debtor agreed to an untimely objection); *In re Barley*, 130 B.R. 66, 69 (Bankr. N.D. Ind. 1991) (untimely complaint not raised in answer or at trial); *In re Booth*, 103 B.R. 800, 801 (Bankr. S.D. Miss. 1989) (debtor failed to raise untimely filing as an affirmative defense); *In re Kirsch*, 65 BR. at 300 (debtor did not raise late filing until after trial).

Respondent's conjecture that a debtor may hold an objection to a late-filed complaint in "strategic reserve" is far more theoretical than real. Resp. Br. at 28. As the court pointed out in *Poskanzer* when holding that the deadline may not be waived, a debtor's own self-interest "will encourage prompt assertion of the bar date defense." 146 B.R. at 131. And here again, this is merely another policy argument that cannot override the explicit language of the rule.

G. Respondent and Amicus Fail to Distinguish *Taylor* or *Carlisle*

The essence of respondent's and amicus' attempt to distinguish *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992) and *Carlisle* is that though these decisions did not allow an untimely filing to be excused on equitable grounds, they did not specifically consider waiver. Resp. Br. at 34-39, Amicus Br. at 17-19. This is a distinction without a difference. As to *Taylor*, neither respondent nor amicus claims that the rule at issue there, 4003, is materially different from Rule 4004 or 4007. *See Thomas*, 203 B.R. at 68 (court relies on *Taylor* and the similarities between Rules 4003 and 4007 to find that Rule 4007 is jurisdictional). Instead, respondent suggests that *Taylor* turned on the fact that the proposed bad faith exception to Rule 4003 was not an "equitable power" known at common law and thus "other traditionally recognized equitable defenses" would have still applied. Resp. Br. at 35-36. However, *Taylor* made

no mention of whether a bad faith exception was recognized at common law. Rather, it relied on the unambiguous language of Rule 4003 that an objection had to be filed within the deadline set by the rule unless the bankruptcy court extended it before it expired. 503 U.S. at 643.

Respondent also suggests that traditional equitable defenses would have applied in *Taylor* based on the bankruptcy court's general powers in section 105 of the Bankruptcy Code, if only the petitioner had raised that issue. Resp. Br. at 36. Here again, general equitable powers cannot override the express language of the rule. *See Matter of Carlson*, 126 F.3d 915, 920 (7th Cir. 1997) (equitable powers in section 105 do not allow the court to "override plain command" of another statute). And, as shown above, the text of the rules—including Rule 4003—do not permit a selective inclusion or exclusion of various gradations of equitable defenses. In sum, if Rule 4003 was clear enough not to allow a late objection under a bad faith exception, it would not allow the same untimely filing under other equitable exceptions such as waiver.

As to *Carlisle*, respondent and amicus do not contend that the wording of Rule 45(b) is materially different from Rule 9006(b)(3). Rather, again both argue that *Carlisle* does not apply because it did not specifically address waiver. Resp. Br. at 36-39, Amicus Br. at 17-18, n. 9. In *Carlisle*, the government maintained that the text of Rules 29 and 45(b) when "read together make clear that a district court lacks jurisdiction" to consider a motion for acquittal after the deadline had expired. Brief of the United States, 1995 WL 728581 at * 14.

Thus, the government's attempt to distinguish *Carlisle* here is inconsistent with its earlier position in

the same case. As such, it is left to contend that a deadline modeled on Rule 6(b) is jurisdictional when the government asserts it, but non-jurisdictional when a private citizen does. The alternative to this position is that the government may waive the Rule 45(b) deadlines—which it does not maintain and which would be contrary to settled law in any event. *See, e.g., United States v. McDowell*, 117 F.3d 974, 978-79 (7th Cir. 1997) (though neither party raised an untimely motion to reduce sentence under Rule 35(b), court notes that Rule 35 is limited by Rule 45(b) and holds that the time limit is jurisdictional). Therefore, when considering *Carlisle*, the controlling principle of this case applies once more. The unambiguous language of Rules 29 and 45(b) and the parallel language of Rules 4004 and 9006(b)(3) do not excuse untimely filings based on equitable grounds, including waiver.

CONCLUSION

The decision of the court below should be reversed.

Respectfully submitted,

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